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CRIMINALIZING VICTIMS: THE IMPORTANCE OF ENDING FELONY PROSTITUTION IN ILLINOIS

I. INTRODUCTION

On August 8, 2011, Illinois Governor Patrick Quinn signed the Justice for Victims of Sex Trafficking Crimes Act, which enables victims of sex trafficking to clear their criminal records of prostitution convictions incident to their trafficking. This law is extremely important as it represents a significant paradigm shift from one that treats sex trafficked persons as criminals to one that recognizes such persons as crime victims.

Research undertaken in Illinois has demonstrated that some pimps use the exact abusive and coercive tactics used by traffickers to prostitute girls and women. Unfortunately in Illinois, the criminal justice system still responds to the structural violence, coercion and exploitation that exist in prostitution with criminal felony charges. The criminal laws against prostitution in Illinois turn women into criminals for being victimized and for being trafficked.

This article argues that Illinois must eliminate felony prostitution to be in concert with Illinois' new, progressive anti-trafficking dialogues and policies. Part II defines "prostitution", "pimping" and "sex-trafficking" and examines how the defini-

2 See id.
3 This note focuses on prostituted women and girls as they make up the majority of trafficking victims; however, it is important to remember that boys and sometimes men are also victims of trafficking and prostitution. See Jody Raphael and Brenda Myers-Powell, From Victims to Victimizers: Interviews With 25 Ex-Pimps In Chicago, DePaul Univ. Coll. Of Law (September 2011).

A. Exploitation and Violence Against Women is the Common Denominator

Brenda Myers-Powell was only a young teenager when she first sold her body for money to pay for food and rent. Brenda remembers the women she saw on her Chicago neighborhood street corner because “they wore shiny clothes and [she] wanted to be and feel shiny” too. Brenda’s grandmother told Brenda that those women “were taking their panties off and men were giving them money.” Brenda identified with the women because men had been taking her panties off, without pay, since she was very young. Like many girls who enter the sex trade, Brenda grew up in a house in which she was sexually abused. She remembers being routinely sexually assaulted as a young child. To her, prostitution seemed inevitable.

6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
As a teen, Brenda began working in the sex trade full-time. Shortly thereafter, two pimps kidnapped Brenda and held her against her will for about six months. They threatened Brenda by telling her they could “shoot [her] and put [her] in a cornfield and that nobody would know” and Brenda believed them.

It took decades for Brenda to escape the abusive control of pimps and the devastations of the sex trade. As is common for girls and women in prostitution, Brenda moved back and forth between street prostitution and indoor venues like strip clubs. During her youth, she might have been labeled a call girl, servicing a higher-end clientele at swanky hotels. Some nights Brenda made over a thousand dollars, but her pimps always took more than half of her profits. Ultimately, Brenda developed a drug addiction and wound up homeless and prostituting on violent streets.

During the twenty-five years Brenda was involved in prostitution, she was shot five times, stabbed more than thirteen times and beaten repeatedly by pimps or customers.

Brenda’s life changed in 1997 after a customer dragged Brenda from his car for five blocks. It left Brenda’s face and left side mangled. Following a weeklong stay in the hospital, Brenda was sure that she would die at the hands of a pimp or customer if she stayed involved in prostitution, so Brenda found

14 Strauss, supra note 12.  
15 Id.  
16 Id.  
17 Id.  
19 Strauss, supra note 12.
her way out. She became involved in a service program that offered long-term housing and that did not turn her away despite her lengthy criminal record.\(^\text{20}\)

**B. The Issue Illuminated: Women in Prostitution May Be Victims of Violence and Trafficking**

Under the national and international definition of trafficking, Brenda was a victim of sex trafficking.\(^\text{21}\) Under Illinois law, however, Brenda was a criminal. Law enforcement officials and the criminal justice system believed women like Brenda deserved criminal charges rather than support and social services.

Brenda’s story reflects the reality that violence, coercion and exploitation are often present in prostitution.\(^\text{22}\) Like Brenda’s pimps, many pimps use the same abusive and coercive tactics as traffickers use to prostitute girls and women. Like Brenda, most women in Illinois, according to research, are engaged in prostitution because they were once girls in prostitution, or because pimps and traffickers have taken advantage of their vulnerability resulting from poverty or abuse.\(^\text{23}\) Research reveals that women in prostitution in Illinois have found themselves in such vulnerable situations so that letting any man rape them without recourse is preferable to starvation, homelessness, or going

\(^{20}\) *Id.* Brenda Myers-Powell is now a leading survivor-activist in ending the commercial sex trade industry in Illinois and nationwide.


through withdrawal alone.\textsuperscript{24} The reality of violence, coercion and exploitation that exists in prostitution and trafficking demonstrates why Illinois should ban felony prostitution and establish more sound policies aligned with anti-trafficking goals.

i. Facts and Figures of Violence in the Commercial Sex Trade

Many people may believe that prostitution is a "victimless crime." This belief is mistaken and Illinois' criminal justice system does little to protect women who are harmed by prostitution. Prostituted women suffer frequent sexual assaults and rape is especially prevalent because of increased exposure and high crime areas in which they work.\textsuperscript{25} Jody Raphael and Deborah Shapiro's 2002 study showed that of 101 women in Chicago engaged in street prostitution, 38.6 had been raped at least 5 times (21.8\% had been raped more than 10 times), 58.4\% had been slapped and 44.6\% had been punched.\textsuperscript{26} The study goes on to demonstrate that women engaged in off-street prostitution venues were also victims of violence.\textsuperscript{27} Half of the women interviewed who were involved with escort services had been raped and subjected to other forms of violence such as be-
The women interviewed who were engaged in prostitution identified customers as the most frequent perpetrators of violence across all types of prostitution. Another survey suggests that 65% of women in prostitution have been seriously injured by a customer. Because customers are well aware that women in prostitution will not likely report crimes committed against them because the women are committing a crime, customers may take advantage of prostituted women's legal vulnerability.

In Chicago, violence against women in prostitution doesn't end with customers. Raphael and Shapiro's study showed that of the 222 women interviewed who were engaged in prostitution, large numbers of them believed they would be physically harmed or threatened if they did not give the money they made in prostitution to a third-party, their "pimp." Pimps and traffickers use methods such as denying freedom of movement, isolation, controlling money, threats and intimidation, drug and alcohol addictions, and physical and sexual violence to control women in the commercial sex trade. In Jody Raphael and Jessica Ashley's 2008 study of 100 Chicago women in prostitution controlled by a pimp, 71% of women experienced slapping, 48% reported punching and 47% reported rape. Fifty-five percent of the women interviewed stated that their pimps currently subjected them to coercion through threats, monetary withholding,
and verbal abuse. Pimps stole money from 62% of the women and threatened 61% with ending their romantic relationship. Nearly 60% of the women were told that they were indebted to their pimps for providing food, clothing, and gifts. More than one-third of women stated that their pimps threatened to kick them out of the house. Thirty-five percent of participants said they were coerced into the sex trade.

Women in prostitution report that pimps are the source of the majority and most severe forms of abuse they experience. The abuse pimps inflict is so violent and severe it may account for the lack of obtainable information on how many women are actually under duress of a pimp or trafficker. It may also account for the lack of information on how many women who are charged with felony prostitution are actually victims of pimp abuse rather than “criminal prostitutes.” Some researchers also suggest that research grossly understates the involvement of pimps in the sex trade industry due to methodology limitations – women under control of a pimp cannot safely escape or speak up about the reality of their situation.

ii. A Bold Paradox: Illinois’ Failure in Coordinating its Prostitution and Trafficking Laws

In January 2012, Illinois took an important step towards aligning itself with national anti-trafficking goals when it enacted the

34 Id.
35 Id.
36 Id.
37 Id.
38 See, e.g., Jody Raphael & Jessica Ashley, Domestic Sex Trafficking of Chicago Women and Girls, Ill. Criminal Justice Info. Auth. & DePaul Univ. Coll. Of Law (May 2008) (Coercion was defined as providing or denying certain benefits, threats, or verbal abuse. Almost one-third of participants were told that they owed the recruiters because of the provision of food, clothing, or gifts, 29% were threatened with harm, and 23% said the person recruiting them threatened to end a romantic relationship with their pimp).
39 See, e.g., id.
40 See, e.g., id. at 2. (there may be many other reasons for this underreporting including the normalization or non-naming of violence in these women’s lives).
Justice for Victims of Sex-trafficking Crimes Act. In January 2013, Illinois adopted a new definition of “trafficking” under the criminal code. This new definition of “sex-trafficking” will redefine many pimps as traffickers while recognizing women like Brenda as victims of trafficking rather than criminals.

Unfortunately, many women who share similar experiences to Brenda will not be recognized as victims of trafficking and will continue to be considered criminals. During criminal investigations, many prostituted women feel compelled to lie to law enforcement to protect their pimps, fear repercussions if they come forward to identify their pimps, or may not even recognize themselves as a trafficking victim. As a result, instead of being acknowledged as victims deserving of social services, law enforcement officials will charge trafficked women with misdemeanors or felonies, thereby failing to identify the reality of the situation by believing these women are criminals in the sex trade of their own free will.

Currently, Illinois law embodies a bold paradox: the victimization of trafficked women and their need for services is highly visible, but Illinois’ legal response to women in prostitution is often felony charges. “...[F]ailure to coordinate sex trafficking and prostitution enforcement represents not only a loss for trafficking victims, but also a loss for . . . leadership in the counter-trafficking movement.” Illinois must acknowledge the ways in

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42 720 ILCS 5/10-9(d) (2013).
46 Id.; see also, Trafficking in persons, involuntary servitude, and related offenses, 720 ILCS 5/10-9 (2013).
47 “Although the U.S. threatens sanctions against nations who fail to combat trafficking, and casts itself as a champion in the crusade against modern slavery, it remains the only industrialized democracy where the majority of trafficking victims are its own citizens.” Moira Heiges, From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Traffick-
which the dominant prostitution criminal enforcement structure is obstructing enforcement of anti-trafficking policies in Illinois.

II. PROSTITUTION, PIMPING AND SEX TRAFFICKING DEFINED

Recent research demonstrates the significant incidence of trafficking within the domestic prostitution industry. Jody Raphael and Brenda Myers-Powell interviewed twenty-five ex-pimps in one Chicago study. The study exposes how the prevalence of men willing to purchase sex makes pimps see unlimited business potential: “‘Sex sells like wildfire,’ said one ex-pimp. ‘It’s like sticking your pole into a fishing hole. Somebody is going to bite,’ explained another.” As demonstrated by the study, pimps make money by coercing needy and vulnerable girls through violence and isolation from more legitimate sources of support and assistance. Although research is difficult to obtain from women in prostitution and their pimps, the Illinois research that has been undertaken exposes the often intertwined relationship between prostitution and sex trafficking.

ing In The United States and Abroad, 94 Minn. L. Rev. 428, 429-30 (Dec. 2009).


50 Id. at 6.


52 “In our sample, many women, regardless of prostitution venue, stated they gave a percentage of the money from prostitution to someone else, and they reported they would face violence if they stopped giving money to this person. Women involved with pimps were significantly less likely to feel able to safely leave prostitution.” Jody Raphael and Deborah L. Shapiro, Sisters Speak Out: The Lives and Needs of Prostituted Women in Chicago: A Research Study, Center for Impact Research, 31 (Aug. 2002), available at: http://www.healthtrust.net/sites/default/files/publications/sistersspeakout.pdf.
A. Prostitution: Traditional Definitions in Opposition with Current Policies

Prostitution has generally been defined as "engaging in sexual activity for money or its equivalent." Virtually every state in the nation has criminalized prostitution completely. In contrast to identifying women subjected to sex trafficking as victims, women involved in prostitution have traditionally been viewed as criminals who commit an offense against society, public health and welfare. Today, prostitution police units are still called "Vice Squads," which serves as an example of how society continues to blame women in prostitution for degradation of social morals and view them as women given to "indiscriminate lewdness for gain."

In Illinois, constitutional arguments against criminalizing prostitution have historically failed. Courts have determined that the Illinois legislature is acting within its proper scope of authority in criminalizing prostitution because of legitimate State interest in safeguarding the public against venereal disease, crimes of violence, theft and protecting the integrity and stability of family life. Although many people argue that these State interests would be better served by legalizing or de-

53 63C AM. JUR. 2D PROSTITUTION § 1 (2012).
55 73 C.J.S. Prostitution and Related Offenses § 1 (2012).
56 Moira Heiges, From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking In The United States and Abroad, 94 MINN. L. REV. 428, 432 (Dec. 2009).
57 State v. Stoyell, 54 Me. 24, 27 (1866).
58 See, e.g., People v. Johnson, 60 Ill. App. 3d 183, 190, 376 N.E.2d 381, 386 (1978) (In which defendant argued criminal prostitution charges violated First Amendment rights to Freedom of Speech and right to privacy).
59 Id.
criminalizing prostitution, Illinois courts have refused to address those arguments by stating that the issue should be settled by the State legislature.60

Trafficking laws have been enacted to address the harms inflicted upon prostituted people.61 In contrast, prostitution laws have been enacted in hopes of combating moral corruption, the spread of disease, crime and other social “evils” believed to be caused by prostitutes.62 Where more progressive international trafficking laws presume non-consent,63 Illinois prostitution laws presume prostitution acts to be voluntary, and therefore deserving of criminal sanctions.64

B. Pimping: Current Illinois Definition

In Illinois, an individual who “promotes prostitution” is defined as, “any person who knowingly... advances prostitution, profits from prostitution, compels a person to become a prostitute, arranges or offers to arrange a situation in which a person may practice prostitution; or any means other than those described.”65 An individual who engages in “promoting prostitution” is a pimp.66

60 Id. (Cook County has attempted to find its own remedy to this issue by creating the WINGS felony prostitution court. I will discuss this intermediate remedy in Part III).
61 Moira Heiges, From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking In The United States and Abroad, 94 MINN. L. REV. 428, 432 (Dec. 2009).
62 Id. See also People v. Johnson, 60 Ill. App. 3d at 190, 376 N.E.2d at, 386 (upholding Illinois prostitution statute because it is a rational attempt to protect valid State interests).
63 Moira Heiges, From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking In The United States and Abroad, 94 MINN. L. REV. 428, 432 (Dec. 2009); See also Palermo Protocol, supra note 23, art. 3(b) (indicating the irrelevance of victims’ “consent” to be trafficked).
64 Moira Heiges, From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking In The United States and Abroad, 94 MINN. L. REV. 428, 432 (Dec. 2009); See also 720 ILCS 5/11-14.
C. Sex Trafficking: Current Definitions

i. U.N. Definition of Trafficking

In 2000, the United Nation’s Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, defined trafficking in persons to mean,

the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation. . . .(b) The consent of a victim of trafficking in persons to the intended exploitation. . . .shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.67

This definition is hinged upon notions of force, coercion, abduction, fraud, and deception, abuse of power or vulnerability, or

giving payments or benefits to a person in control of a victim for the purpose of exploitation, which includes exploiting the prostitution of others or sexual exploitation. The U.N. definition covers virtually all third-party involvement in prostitution.\(^68\)

The definition in the “Palermo Protocol”, as it is generally referred, helps explain the nexus between prostitution and trafficking. The U.N. definition is progressive because it says that the consent of the victim to the intended exploitation is irrelevant to the question of whether or not trafficking occurred.\(^69\) It gives critical substance to what is meant by “vulnerability,” by specifying that “States Parties shall take or strengthen measures...to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment, and lack of equal opportunity.”\(^70\)

The Palermo Protocol’s language makes clear that by the United Nation’s standards, even when people “choose” to engage in prostitution, individuals who profit from, or take advantage of, desperation and inequality to recruit, transport, harbor or maintain girls and women into and in prostitution for their own benefit are traffickers and should be treated as criminals.\(^71\) Those women and girls who are trafficked, however, are victims who should be protected and assisted.\(^72\)

The Palermo Protocol’s definition “intentionally shifts the focus of anti-trafficking laws from the willingness of those whose bodies are sold for sex to the actions of those people who profit from the prostitution of others and who take advantage of poverty and other vulnerabilities to keep the sex industry staffed.”\(^73\) The Palermo Protocol is rooted in preventing pimps from using the “she wanted it” defense, “a defense that has an all-too-familiar power to anyone who is attentive to the prosecution (or lack

\(^{68}\) Id. at 3(a).

\(^{69}\) Id.

\(^{70}\) Id. at 9(b)(4).

\(^{71}\) Id. at 3(b).

\(^{72}\) Id.

thereof) of crimes against women generally."\textsuperscript{74} Through this definition, the Palermo Protocol challenges the status quo complicity in the routine and systematic sexual harming of girls and women through prostitution.\textsuperscript{75}

\textbf{ii. U.S. Federal Definition of Trafficking}

In 2000, federal law recognized the cycle of violence, coercion, and exploitation that can exist between prostitution and trafficking when it passed the Trafficking Victims Protection Act (TV-PRA) of 2000.\textsuperscript{76} The TVPRA defines sex trafficking as, "...the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."\textsuperscript{77}

The TVPRA expanded the federal anti-trafficking policy to also address the abusive practices and the exploitation of minors in the U.S. prostitution industry.\textsuperscript{78} Federal law defines trafficking under the TVPRA and criminalizes "severe forms of trafficking," induced by force, fraud or coercion and used to exploit a person for prostitution, including the exploitation of a minor for prostitution by any means.\textsuperscript{79} Under the TVPRA, any juvenile in prostitution, despite the absence of force, fraud or coercion, is considered a victim of trafficking.\textsuperscript{80}

Within the federal reauthorization of the TVPRA in 2008, Congress explicitly addressed the failure of state sentencing guidelines which results in weak penalties for convicted traffickers and victims who are repeatedly punished more harshly than the traffickers themselves.\textsuperscript{81} The TVPRA reauthorization's def-

\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.}
\textsuperscript{80} \textit{Id.}
inition of trafficking does not require interstate travel and covers domestic trafficking of girls and women. The TVPRA further authorized Congress to appropriate money for services for girls and women who are victims of domestic trafficking.

iii. Illinois' Definition of Trafficking

Although Illinois' new definition of trafficking is more aligned with federal law, it remains less clear. The Illinois definition states that

[a] person commits trafficking in persons when he or she knowingly: (1) recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, intending or knowing that the person will be subjected to involuntary servitude; or (2) benefits, financially or by receiving anything of value, from participation in a venture that has engaged in an act of involuntary servitude or involuntary sexual servitude of a minor.

In Illinois, trafficking is a Class 1 felony. A trafficking victim is anyone who is subjected to the acts of the trafficker.

On January 1, 2013, Illinois expanded the definition of trafficking to include additional means by which a trafficker can obtain or maintain a victim, such as using threats or abuse of law,
intimidating, exerting financial control or using any scheme, plan or pattern intended to cause the person to believe that, if the person did not perform the labor, that person would suffer serious harm. The law extends the statute of limitations for prosecutors to bring charges against traffickers in cases involving minors. This law also clarifies the statute's language and lessens the emphasis placed on "force," which will help prosecutors to more effectively utilize the involuntary servitude statute and will in turn protect victims.

D. Some Women in Prostitution Meet Definitions of 'Trafficked'

Given the demand for women's bodies in prostitution, traffickers seek to exploit that demand by finding women and making money off them. As demand for prostitution increases, so does the rate of sex trafficking. For this reason, prostitution and sex trafficking are necessarily intertwined. Experts have indicated that a significant percentage of adults in prostitution may also be victims of sex trafficking and not free from pimp coercion, control and violence. Illinois' new trafficking definitions and statutes recognize that many women in prostitution are traf-
ficking victims. Views about prostitution are changing and many people no longer believe it is a crime against morality perpetuated by women in prostitution. Prostitution provides the platform for continued victimization for other serious sex trafficking crimes.

As the Palermo Protocol sets out, it is well understood that sex traffickers use coercive schemes "designed to trick, coerce, and win the confidence of potential victims" in order to profit from the consumer demand for commercial sex. A former pimp interviewed in one Chicago study made it clear that pimps implement these same techniques: "it's impossible to protect all girls from guys like I was because that's what we do. We eat, drink and sleep thinking of ways to trick young girls into doing what we want them to do." Traffickers and pimps target girls from impoverished communities who have experienced high rates of child sexual abuse and who have little or no options to escape poverty. Recent interviews with ex-pimps in Chicago document pimps' practice of recruiting girls as young as 14 and controlling them by retaining all their earnings. The experiences of women in Chicago who regularly engage in prostitution reveal that at the very least some of the women are trafficking victims as defined by the Palermo Protocol.

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93 720 ILCS 5/10-9.
94 Moira Heiges, From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking In The United States and Abroad, 94 MINN. L. REV. 428, 434 (Dec. 2009).
95 Id.
96 The Palermo Protocol, supra note 23.
100 Jody Raphael & Brenda Myers-Powell, Interviews with Five Ex-Pimps in Chicago, DePaul Univ. Coll. Of Law 5 (April 2009) (note that it is the researchers aim to expand this research).
accounts of girls and women like Brenda who are prostituted in Chicago demonstrate what abuse of power looks like. These accounts exemplify the abuse of people in vulnerable positions and they give real meaning to what is intended by the term "exploitation."

III. OTHER SEX TRAFFICKING AND PROSTITUTION LAWS AND DEVELOPMENTS IN ILLINOIS


A. Illinois' Felony Prostitution

i. Illinois' Black Letter Felony Prostitution Law

In Illinois, any person who knowingly performs, offers or agrees to perform any act of sexual penetration for anything of value, or any touching or fondling of the sex organs of one person by another person, for anything of value, for the purpose of sexual arousal or gratification commits an act of prostitution.\(^{102}\) A violation of that section is punished as a Class A misdemeanor, unless the violation is committed within 1,000 feet of real property comprising a school, in which case it is punished as a Class 4 felony.\(^{103}\) A second or subsequent violation of the statute can be upgraded to a Class 4 felony.\(^{104}\)

Illinois' prostitution law is among the harshest in the country. Illinois is the only state in the nation to allow a felony upgrade for a second prostitution offense.\(^ {105}\) Illinois is one of only seven

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\(^{102}\) 720 ILCS 5/11-14(a).
\(^{103}\) 720 ILCS 5/11-14(b).
\(^{104}\) Id.
\(^{105}\) See id. (noted after comparing all 50 states and their criminal prostitution statutes); See also Procon.org, US Federal and State Prostitution Laws
states to allow felony upgrades for subsequent prostitution charges at some point.106

Whenever any individual who has not previously been convicted of or placed on probation for felony prostitution pleads guilty to or is found guilty of felony prostitution, the Illinois court, without entering a judgment and with the consent of the individual, may sentence the individual to probation.107 Here, it is important to remember that although the judge has discretion to sentence a first time offender to probation, if the person does not “successfully” complete probation, she will be charged with a felony and that will be reflected in her permanent record108 – defeating the purpose behind the probation in the first place and continuing the systematic victimization of prostituted women by preventing them from obtaining a job, housing or a safe way to exit the trade.

In 2010, Illinois passed the Safe Children Act, which made Illinois the first state in the nation to deem all children under eighteen immune from prostitution charges under any circumstance.109 Under the law, individuals exploiting minors faced higher penalties and limited availability to affirmative defenses.110 The law also increased first-time patronizing charges to a felony.111 With The Safe Children Act, Illinois expanded and Related Punishments, http://prostitution.procon.org/view.resource.php?resourceID=000119#2.


107 720 ILCS 5/11-14(c)(1).

108 720 ILCS 5/11-14(c)(5); see also, 2007 Legis. Bill Hist. IL S.B. 75.

109 End Demand Illinois, Public Act 96-1464: Illinois Safe Children Act Summary, http://www.enddemandillinois.org/sites/default/files/IL%20Safe%20Children%20Act%20Summary%20Nov%202010%20FINAL.pdf (last visited Jan. 3 2013). (Seven other states have similar legislation, but for juveniles in prostitution under the age of 16. Although in Illinois, children under the age 18 can be referred to DCFS or the juvenile system.)

110 Id.

111 720 ILCS 5/11-14.1(b)
the progress of the groundbreaking New York Safe Harbor for Exploited Children Act of 2008.ii

ii. Felony Upgrade’s Gendered Application

As the law is written, women and girls involved in the sex trade are not as likely to face felony charges as buyers, who can be charged with a felony on their first offense under the Illinois Safe Children Act.ii A Chicago Coalition for the Homeless study, however, shows a different truth – prostitution-related felonies are being levied almost exclusively against women in prostitution rather than against the men who buy sex.ii During a two year period between January 2010 and December 2011, there were 508 prostitution related arrests: Of those 508 arrests, 501 were for prostitution, two were for soliciting a prostitute, four for pandering, and one for keeping a place of prostitution.ii That means, “barely 1% of arrests (5) were of pimps/traffickers” and “fewer than that represent consumers of prostitution, if any.”ii In 2011 there was a 26% increase in felony prostitution-related offenses over 2010. In 2011, there were 368 felony prostitution-related arrests, and of those 368 arrests, 326 were for felony prostitution (more than 96% of those arrests for prostitution were of women). Tellingly, only five of those 368 felony arrests were for solicitation of a prostitute, less than 1% of all the felony-prostitution related offenses in 2011.ii


ii 720 ILCS 5/11-14.1(b-5).

ii Daria Mueller, Coalition for the Homeless: Criminal Justice Response to Prostitution (November, 2012).

ii Id.

ii Id.

ii Id.

ii Id.

ii Id.
Under the current law, a person buying sex must be caught in the act or transaction to be charged with a patronizing felony. Even on repeat charges, attempting to pick someone up for prostitution remains a misdemeanor. People in the sex trade on the other hand, can face a felony for "performing, offering or agreeing to perform" an act of prostitution on their second offense. These definitions make it easier to arrest women who are known to have a history of prostitution charges than it is to arrest repeat customers.

Like customers, pimps can more easily evade criminal charges by using an affirmative defense. If arrested for promoting a juvenile in prostitution, pimps can claim they were not aware of the minor's age and avoid being prosecuted. These affirmative defenses made available to the men who profit from and demand commercial sex further illuminates the discriminatory application of Illinois law by protecting traffickers from ever actually being criminally prosecuted.

B. Justice For Victims of Sex Trafficking Crimes Act

In stark contrast to Illinois' felony upgrade for prostitution, Illinois enacted the Justice for Victims of Sex Trafficking Crimes Act in 2011. In doing so, Illinois became the third state in the nation with a law enabling victims of sex trafficking to clear their records of prostitution convictions incident to their trafficking. This Act was passed in an effort to better identify and protect victims of trafficking. The law built on the progress first made by the landmark New York Vacating Convictions for Trafficked Persons Act of 2010 and the Maryland Human Trafficking Victim Protection Act of 2011.

120 720 ILCS 5/11-18.
121 720 ILCS 5/11-14.1(b).
122 720 ILCS 5/11-14(b).
123 720 ILCS 5/11-14.4(c).
124 720 ILCS 5/11-14.4(c).
126 End Demand Illinois, supra note 1; 725 ILCS 5/116-2.1
127 End Demand Illinois, supra note 1.
The Illinois Act added a new section within 725 ILCS 5/116 “Post Trial Motions” in the criminal procedure code to allow victims of sex trafficking, as defined in either the Illinois or Federal human trafficking statutes, to file a petition requesting a court to vacate prior prostitution related convictions, under specific criteria.\(^{128}\) A petition must state facts to support the claim that at the time of the prostitution offense the petitioner was a victim of a sex trafficking crime defined by existing federal or state criminal laws, and state why these facts were not presented to the trial court.\(^{129}\) The motion would only apply to survivors who have sought services provided for victims of trafficking and who have escaped the trafficking.\(^{130}\) The law applies to all qualifying convictions that have occurred before or after the law took effect and the petition can be filed at any time after the entry of a prostitution conviction.\(^{131}\)

i. **Significance of Justice For Victims of Sex Trafficking Crimes Act in Illinois and Its Application**

The Justice for Victims of Sex Trafficking Crimes Act represents the significant paradigm shift anti-trafficking activists have been calling for – from one that treats sex trafficked persons as criminals to one that recognizes such persons as crime victims. Unfortunately, there is a hard reality that victims of trafficking are often arrested, convicted, released and re-arrested multiple times without the justice system recognizing the relationship between a trafficked woman and a woman in prostitution.\(^{132}\) Similar to New York’s law, Illinois’ vacating prostitution convictions

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\(^{128}\) Id.

\(^{129}\) Id. I will explore this issue in more depth in the following section, when I discuss why it is that many women feel compelled to protect their traffickers rather than convict them.

\(^{130}\) Id.

\(^{131}\) Id.

law was drafted with the intention of bridging the gap between anti-trafficking goals and Illinois' current prostitution laws.133

In Illinois, this new law is expected to be primarily applied retroactively for women who have been prosecuted in the past and are presently living with criminal records as a result.134 The statute also presents new possibilities for women who are currently being prosecuted for criminal prostitution.135

The Justice for Victims of Sex Trafficking Crimes Act ushers in a new era of protecting victims of sex trafficking. One expert is of the opinion, however, that the more law enforcement and prosecutors believe that they are attentive to identifying trafficking issues during the prosecution, the less sympathy law enforcement and prosecutors will have for women who identify as trafficked after they have already been prosecuted for prostitution.136 With both felony prostitution charges and new, more progressive anti-trafficking laws on the books, if a woman is a trafficking victim, then she potentially has resources and protections, but if law enforcement investigators find that she is not a trafficking victim, then she is automatically deemed a criminal and can be charged with felony prostitution, imprisoned with no recourse.

If investigators fail to adequately identify prostituted women as trafficking victims, then the women will indefinitely be labeled as criminals with no further investigation. This creates an entirely new issue for the women who will certainly use the Justice for Victims of Sex Trafficking Crimes Act in the future, as law enforcement will be hesitant to grant the petitions if that means they would have to admit the initial investigation was erroneous.137

133 Id.
134 Interview with Kaethe Morris Hoffer, Then Deputy Executive Director and Legal Director, Chicago Alliance Against Sexual Exploitation, in Chicago, Ill. (Nov. 28, 2012).
135 Id.
136 Id.
137 Id.
IV. **EMBODIMENT OF THE PARADOX: COOK COUNTY WINGS COURT**

**A. Background of “Women in Need of Gender-specific Services” Court**

In January 2011, Chief Judge Timothy C. Evans and Presiding Judge of the Criminal Division Paul P. Biebel established the Women in Need of Gender-specific Services court (WINGS).138 The WINGS court was developed in response to a community-based initiative led by Chicago activists, lawyers and non-profits, among others, who demanded an alternative to the incarceration of trafficking victims.139 The purpose of the WINGS court is to address the underlying issues that led women into the commercial sex trade by offering rehabilitative resources for women charged with felony prostitution to emotionally, psychologically and educationally develop while providing vocational alternatives to the commercial sex trade.140 The court provides a two-year treatment plan under which women receive substance treatment, trauma counseling and job training free of charge.141

The WINGS court was initially created to serve only twenty-five participants.142 In September 2011, a second court call added, “Feathers”, due to the steady increase of felonies being brought against women in prostitution.143

The survivors of the sex trade whose arrests have led them to face charges in the WINGS court typically face felonies due to

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138 Judge Rosemary Grant Higgins, WINGS Court, Address at The Cook County Commission on Women’s Issues Public Hearing (Oct. 18, 2012).
140 Judge Rosemary Grant Higgins, WINGS Court, Address at The Cook County Commission on Women’s Issues Public Hearing (Oct. 18, 2012).
141 State of Illinois Circuit Court of Cook County, *supra* note 139.
142 *Id.*
143 *Id.*
prior misdemeanor prostitution convictions. These women can avoid a possible prison sentence by pleading guilty to a felony and starting a probation term that includes the two-year treatment program. The increase in prostitution felonies may well be the unintended result of the WINGS court.

B. Why the WINGS Court Continues to Victimize Women in Prostitution and Why WINGS is Not an Answer to Ending Sex Trafficking

The WINGS court perfectly embodies the current paradox that exists in Illinois: the victimization of survivors of the sex trade and their need for services is highly visible, but Illinois continues to respond to the issue with felony charges. In creating the WINGS court, Cook County implicitly recognized that the categorization and sorting out of the “sex trafficking victim” and the “criminal prostitute” is senseless because violence, coercion and exploitation exist in both scenarios. The WINGS court is Cook County’s own remedy to Illinois legislation’s refusal to address such issues.

The result of this felony prostitution court is a normalization of, and even prosecutorial preference for, felony charges. In this scenario, Cook County prosecutors may believe that bringing felony charges is a good thing for these women because it gives them an opportunity to obtain treatment where they otherwise would not. Likewise, if women do not want to be immediately incarcerated, pleading guilty to a felony may seem like a good

145 Id.  
146 Daria Mueller, then Associate Director of State Affairs for Chicago Coalition for the Homeless, said, “I feel like that [felony upgrade] has been happening much more easily, quickly, and frequently,” since the beginning of WINGS. See Christie Thompson, Escort to Jail, THE CHICAGO REPORTER (November 1, 2012), http://www.chicagoreporter.com/news/2012/11/escorted-jail.  
147 Interview with Jody Raphael, Senior Research Fellow and Professor of Law, DePaul University College of Law, in Chicago, Ill. (October 30, 2012).
idea. If women in the WINGS court do not fulfill the two-year treatment plan successfully, they are penalized.

Judge Rosemary Higgins, the Associate Judge who runs the WINGS court, admitted that the women in her court are victims of trauma rather than the perpetrators of it, "[t]he women themselves have a universe of problems." Although the court helps the women find safe housing to escape pimps or domestic violence at home, and trauma counseling helps the women to cope with the sexual and physical abuse that they’ve experienced, it comes at the hefty price of a felony charge.

Although Cook County can say that it has modified the harsh dualism of the “trafficking victim/criminal prostitute,” categorization, it has only been able to do so while working within Illinois’ felony prostitution statute. This reflects a belief that women in prostitution are “criminal volunteers” and continues to label trafficked women as felons. Cook County should be applauded for recognizing the need to provide services to women in prostitution given its inability to change the law or repeal legislation. The WINGS court is a first step to ameliorate the harshness of felony prostitution, but it is no substitution for a ban on felony prostitution altogether.

V. Felony Prostitution Obstructs Anti-Trafficking Goals Because It Incorrectly “Sorts” Women, It Is Punitive And Its Is

A. Felony Prostitution Incorrectly Sorts Women in Prostitution as either “Criminals” or “Sex Trafficking Victims”

As the laws stand, Illinois mandates the sorting of women who are arrested and charged for prostitution into two catego-


149 Id.
ries – the “criminals” and the “sex trafficking victims.”\(^\text{150}\) The “criminal” will get the book thrown at her, get a criminal record and spend time in jail. The “sex trafficking victim,” however, will be provided services rather than jail time.

Categorizing women in prostitution in this manner incorrectly determines which women in prostitution are the “bad” criminals and which are “good” victims deserving services. In reality, however, such categorizing is not so straightforward and a woman in prostitution is not necessarily one or the other. Categorizing women in prostitution in this way is also an impossible task given the cycles of violence, coercion and exploitation we know to exist between both categories. A woman in prostitution may not be trafficked right now, but she may have been in the past and may be in the future. Even if a woman is willingly involved in prostitution, she is still subject to abuse and violence by customers. Violence and exploitation occur in both categories. Illinois’ legal dichotomy does not reflect the more nuanced reality that exists. As a result, Illinois is creating a system that undoubtedly is charging sex trafficking victims with felonies.

**B. Felony Prostitution is Punitive by Failing to Properly Identify Trafficking Victims**

Despite Cook County’s efforts to provide services to prostituted women, Illinois is still labeling sex trafficking victims as criminal felons.\(^\text{151}\) Illinois’ current prostitution law is making an unreasonable request that prostituted women prove they are trafficking victims to receive services rather than criminal charges.\(^\text{152}\) The unfortunate reality is that victims are often instructed by their pimps and traffickers to remain silent and enter a guilty plea so that they can return to their traffickers as soon as possible; and victims often comply out of fear.\(^\text{153}\)

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\(^{150}\) 720 ILCS 5/11-14; 725 ILCS 5/116-2.1.

\(^{151}\) 725 ILCS 5/116-2.1.

\(^{152}\) This is referring to jurisdictions outside Cook County, which has WINGS court.

If a woman is selling sex and law enforcement picks her up, she likely will not admit that she is trafficked because she is confused or motivated by fear and violence.\textsuperscript{154} Research conducted in Chicago reveals that not all women are ready to leave their pimps and prostitution because they are isolated or unable to imagine life outside prostitution and pimp-dependency.\textsuperscript{155} In Raphael and Ashley’s study on pimp-controlled women in prostitution, women talked about their fear of violence if they tried to escape, “I know he won’t let me,” said one, “[I have] fear of what he might do,” said another.\textsuperscript{156} One woman talked about prostitutes’ inability to escape due to fear, but also lack of services, “I need help to protect me and house me where he can’t find me.”\textsuperscript{157} Like exiting domestic violence, leaving the sex trade involves a process of sharing information and offering support over time.\textsuperscript{158}

Prostituted women are treated as criminals in the court system as a result of a combination of distrust for the legal system, fear of retaliation, failure of law enforcement officials to identify persons as trafficked individuals, and, in Cook County the WINGS therapeutic court incentive.\textsuperscript{159} As discussed, this is also problematic as poorly conducted investigation may lead to an inability to clear one’s record when the victim is later ready to come forward to law enforcement with her status as a trafficking victim.


\textsuperscript{155} See \textit{id.}

\textsuperscript{156} \textit{Id.} at 40.

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} \textit{Id.} at 42.

C. Felony Prostitution is Counter Productive: Women Charged with Felony Prostitution Cannot Easily Exit the Sex Trade

As established, victims of trafficking can be convicted of prostitution. As a result, victims often have a difficult time leaving the sex trade once they have a criminal record. There are numerous consequences of bearing a felony criminal record, such as difficulty obtaining adequate employment or access to housing.160

Although some women may freely and willingly engage in prostitution, those women do not represent the large number of women who are coerced into prostitution or who are involved unwillingly, nor do they reflect the number of customers who abuse, violate and exploit women in prostitution's life and bodies. Felony prostitution neither prevents nor assists any woman in prostitution, no matter how law enforcement may categorize her, because women in prostitution can be victims of violence and cannot exit the trade safely or easily with felony criminal records.

Felony prostitution can perpetuate sex trafficking by limiting work and housing options. Traffickers understand this and use felony prostitution as a tool to continue to coerce and maintain control over their victims. By charging women in prostitution with felonies, Illinois is putting trafficking victims, who have nowhere else to go, back into the arms of their traffickers.

Until the Illinois legislature eliminates felony prostitution, and focuses solely on ending the demand for prostitution, trafficking victims will continue to incur felony charges. They will continue to face obstacles in obtaining legitimate work opportunities, housing and services. Once Illinois shifts its focus to ending demand, Illinois has a better opportunity to curb sex trafficking, treat people more humanely, and eliminate gender inequities. Only then will Illinois be better situated to protect

the health and safety of girls and women by creating an environment that makes it easier for women in prostitution to exit the trade safely.

VI. POLICY RECOMMENDATIONS: TAKING A COUNTERTRAFFICKING APPROACH TO PROSTITUTION

Unfortunately, as demonstrated, Illinois’ prostitution laws seem to be written and applied to directly breach what lies at the heart of the Palermo Protocol: opposition to the sexual exploitation of humans, including when the trafficked person has willfully participated in, or “consented” to, the forms of exploitation proscribed under the Palermo Protocol.\(^{161}\)

Illinois cannot meet its anti-trafficking goals while felony prostitution charges are simultaneously implemented. Illinois legislation and enforcement strategies would benefit from a common definition of trafficking – one that is sufficiently comprehensive to represent the reality and nuance of what happens to all women who are trafficked for purposes of sexual exploitation – with or without their consent, and through force, fraud, deception, or abuse of the vulnerability of a victim.\(^{162}\) Illinois

\(^{161}\) The Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, §§ 101 – 113, 114 Stat. 1466, 1466-91 (codified as amended at 22 U.S.C. §§ 7101-7110 (2006)) [hereinafter TVPRA], provides the epitome of U.S. law’s undermining of the Palermo Protocol’s understanding of sex trafficking. Although the definition of “sex trafficking” in the TVPA, 22 U.S.C. §7102(9) mirrors the Palermo Protocol’s definition, other subsections of the TVPA specifically limit the U.S. Department of Justice to prosecuting only “severe forms of trafficking” – these acts of trafficking that involve minors or are accomplished by force, fraud or coercion. See supra note 19 § 7102 (8) (defining “severe forms of trafficking”); Supra note 19 §7106(a) (setting minimum standards for prohibiting and punishing only severe forms of trafficking). The Palermo Protocol’s definition is widely regarded as the world’s standard trafficking definition, and thus U.S. law and policy, specifically Illinois, should follow the understandings of prostitution and trafficking embodied therein. It is important to note that as a party and signatory to the Palermo Protocol, the United States should manifest the definition of trafficking adopted at Palermo in its own laws and policies as well as have impact on state anti-trafficking policies.

\(^{162}\) Janice G. Raymond & Donna M. Hughes, Coalition Against Trafficking in Women, Sex Trafficking of Women in the United States: International and
law and anti-trafficking policies must address prostitution and domestic trafficking together.

A. End Felony Prostitution in Illinois

Felony prostitution must be eliminated in Illinois. Given the evidence regarding the consistent violence and coercion perpetuated against women in prostitution, and the concern and fear that a lot of women are coerced into participating in prostitution and cannot exit safely, the criminalization of women in prostitution is not warranted. The felonization of women in prostitution is inhumane and archaic. The violence and coercion demonstrated in research and individual accounts like Brenda's create a serious barrier for law enforcement when conducting investigations into whether to charge a woman with felony prostitution, or whether to treat her as a sex trafficking victim and provide services. Thus it is logical to simply end the criminalization completely.

The criminalization of women in prostitution is inconsistent with notions of equality for women.\(^6\) It is hypocritical to have a system that charges trafficking victims and exploited women with felonies while simultaneously trying to end sex trafficking. By continuing to bring felony charges, Illinois is unable to achieve meaningful progress in the fight against modern-day slavery.

B. In the Alternative, Women in Prostitution Should Have an Affirmative Defense

In the alternative, I suggest an affirmative defense to protect victims of trafficking. The Justice for Victims of Sex Trafficking Crimes Act is one step towards clearing sex trafficking victims'

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\(^{6}\) Domestic Trends 9, 11 (2001) (noting a study of U.S. women in prostitution revealing that 90% had been verbally threatened, 86% had been physically abused, and 70% had been sexually assaulted by their pimps).

criminal records, but an affirmative defense to prostitution would prevent a criminal record from ever being created. The affirmative defense would allow a woman who is currently being charged with prostitution to claim that she has been coerced into prostitution or abused and exploited while in prostitution as a result of her status as a woman, as poor, as addicted to drugs, etc. This affirmative defense would provide the woman with a path to services rather than incarceration or felony charges.

As discussed, pimps and customers who are charged with promoting or soliciting a juvenile prostitute have an affirmative defense available, in which they can claim ignorance to the girl’s age. Failing to provide an affirmative defense to women in prostitution is discriminatory and violates the Equal Protection Clause of the United States Constitution.

The Fourteenth Amendment provides for equal protection and benefit of the law without discrimination. Although most states’ legislatures presently have gender-neutral prostitution laws, the reality of prostitution is anything but gender neutral. The majority of people in prostitution are women, and the majority of those who profit from and exploit those in prostitution are men. By allowing affirmative defenses for pimps and customers, but not for women in prostitution, discriminatory and unequal protection of the law results. Disparate enforcement combines with this discriminatory design to violate prostituted women’s Fourteenth Amendment right to equal protection of

164 Interview with Lynne Johnson, Policy & Advocacy Director, Chicago Alliance Against Sexual Exploitation, in Chicago, Il. (Nov. 16, 2012).
165 720 ILCS § 5/11-14.4(c).
169 See id.
Unfortunately, as discussed, a woman in prostitution may not feel safe enough to come forward and identify herself as a trafficking victim. Therefore, the affirmative defense would allow for equal protection of the law, but would not allow for equal application of the law.

C. The Need for Social Services, Increased Identification of Trafficked Women and Criminalization of Traffickers, Pimps and Men Who Buy Sex

It is unreasonable to expect that women who are coerced and abused by their pimps while being trafficked can either safely come forward and identify their traffickers or even cooperate in prosecutions. A criminal justice approach that arrests and punishes these women is not only counter-productive, but is also excessively punitive. More creative strategies aligned with anti-trafficking policies are needed.

Not only should there be alternatives to charging, sentencing, and incarceration available for women in prostitution, but there is also a need for social service programming and safety planning. These services should be offered outside the criminal justice context and before criminal charges are brought. End Demand Illinois proposed the creation specialized supportive services exclusively for people who have been prostituted or trafficked. These services would cater to the particular needs of prostituted women by providing a safe home, food, clothing, education, individual counseling, survivor-led mentoring and support groups. These services along with street outreach, ba-

170 Id.
172 Id. at 42.
174 Id.
sic health care, transportation assistance and legal advocacy could be more economically sound than criminalization. Such services are also aligned with the goal of ending the commercial sex trade and sex trafficking.

VII. CONCLUSION

Due to the violence, coercion and exploitation known to exist between both trafficking and prostitution, and because prostitution laws are being applied disproportionately between women involved in prostitution and men who buy and profit from it, it is a sensible ask to end felony prostitution in Illinois.

Although there is an obvious need to penalize pimps, traffickers and customers at the felony level, doing so means little without simultaneously abolishing felony prostitution. Among survivors, activists and academics, there is a widespread understanding that some women in prostitution are victims of violence and exploitation and arresting them only furthers their victimization. Felony prostitution is unjust and is not a realistic solution to end sex trafficking in Illinois.

AFTERWORD

This article went into editing early spring 2013, before bill SB1872 to end felony prostitution in Illinois had been introduced to the Illinois Senate. On March 13, 2013 the Illinois Senate Criminal Law Committee unanimously approved SB 1872 to end felony prostitution in Illinois. On April 11, 2013 the Illinois Senate passed SB 1872 with a vote of 53-1 it moved with strong momentum into the House. On May 28, 2013 the Illinois House passed SB 1872 and the Bill moved back to the Senate for approval of Amendment.

Finally, on August 23, 2013 Governor Pat Quinn signed SB 1872 into law and eliminated felony prostitution in Illinois. The new legislation went into effect immediately. The bill to end felony prostitution received tremendous support and “marks an important shift in our [Illinois’] response to prostituted people.
Law makers from both parties recognized that the current approach was not working and that people in prostitution deserve our help and support."

Rachel D. Johnson*

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* J.D. Candidate, 2014, DePaul University, College of Law; B.A. 2008, Colorado College. I wrote this note in response to the honor I have had to learn from Chicago’s survivors and advocates who have worked tirelessly to provide justice for the girls and women who suffer violence and exploitation at the hands of traffickers, pimps, customers. Thank you for sharing your knowledge, bravery and passion with this world to make it a safer and healthier place for girls and women. I would like to thank my mentors who have guided me in this work Jody Raphael, Kaethe Morris Hoffer and Lynne Johnson.